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Miscellaneous—Continued. Page

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 31

MCLEAN TRUCKING COMPANY, INC., THE SECRETARY OF AGRICULTURE OF THE UNITED STATES, AND AMERICAN FARM BUREAU FEDERATION, APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ASSOCIATED TRANSPORT, INC., BARNWELL BROTHERS, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE SECRETARY OF AGRICULTURE OF THE UNITED STATES

OPINIONS BELOW

The opinion of the specially constituted district court (R. 82–87), is reported in 48 F. Supp. 933. The report of the Interstate Commerce Commission (R. 8–59) appears in 38 M. C. C. 137.

JURISDICTION

The final decree of the district court was entered on December 28, 1942 (R. 89). Petition for

appeal was presented and allowed on February 23, 1943 (R. 90). The jurisdiction of this Court is invoked under Section 210 of the Judicial Code, as amended, 36 Stat. 1150, 38 Stat. 220 [Urgent Deficiencies Act of October 22, 1913], (28 U. S. C. 47a), and Section 238 of the Judicial Code, as amended, 43 Stat. 938 (28 U. S. C. 345). Probable jurisdiction was noted by this Court on April 19, 1943 (R. 1517).

QUESTIONS PRESENTED

The ultimate question is whether an order of the Interstate Commerce Commission authorizing and approving a proposed merger of certain common carriers by motor vehicle operating along the Atlantic seaboard should be set aside. The Commission's order was entered on March 16, 1942, in a proceeding under Section 5 of the Interstate Commerce Act.

The validity of the Commission's order depends upon the determination of the following questions:

1. Whether the Commission, in making its finding under Section 5 (2) (b) of the Interstate Commerce Act that the merger would be "consistent with the public interest," erred as a matter of law in that it applied the standards and criteria applicable to a merger of rail carriers under the Transportation Act of 1920, instead of applying the standards and criteria prescribed by the Transportation Act of 1940 with respect to motor carriers.

2. Whether the Commission, in making its finding that the merger would be "consistent with the public interest," erred by failing to consider and give due weight to the antitrust and other laws of the United States.

3. Whether the Commission erred in concluding that Section 5 (11) of the Interstate Commerce Act (which provides that carriers participating in a merger approved by the Commission in accordance with the provisions of the Act are relieved from the prohibitions of the antitrust and other laws insofar as is necessary to enable them to carry into effect the merger so approved) relieved the Commission from the requirement of considering and giving due weight to the antitrust and other laws of the United States in making its finding that the merger would be "consistent with the public interest."

4. Whether the Commission erred in approving a merger of motor carriers involving the elimination of substantial competition without making a finding that the merger is necessary in order to insure adequate transportation service to the public.

5. Whether the Commission erred in approving the merger without making a finding, under the provisions of Section 5 (2) (c) (1) of the Interstate Commerce Act, as to the effect of the merger upon adequate transportation service to the public.

6. Whether the Commission erred in approving

the merger without making a finding that the effect thereof would be consistent with the National Transportation Policy (as stated in the Transportation Act of 1940) to preserve the inherent advantages of motor-carrier transportation.

7. Whether the Commission erred in failing to apply the proviso of Section 5 (2) (b) of the Interstate Commerce Act and to make a finding as to whether the merger would enable carriers by railroad to use service by motor vehicle to public advantage in their operations and would not unduly restrain competition.

8. Whether the court below erred in failing to consider the important public questions arising under Section 5 (2) (b) and in eliminating from the case all phases of the controversy resulting from the inclusion of Arrow Carrier Corporation in the authorized merger.

9. Whether there is substantial evidence to support the Commission's findings.

STATUTES INVOLVED

The statutes involved are Section 5 of the Interstate Commerce Act, as amended by the Transportation Act of September 18, 1940, 54 Stat. 898, 905–910 (49 U. S. C. 5); the National Transportation Policy set forth in the said Act, 54 Stat. 899; and Sections 1 and 2 of the Sherman Act of July 2, 1890, 26 Stat. 209 (15 U. S. C. 1–2). The pertinent provisions of these statutes are set forth in the Appendix hereto.

STATEMENT

This is a suit to set aside an order of the Interstate Commerce Commission, dated March 16, 1942, authorizing and approving the merger and consolidation of eight large common carriers by motor vehicle [1] along the Atlantic seaboard. Associated Transport, Inc., a Delaware corporation, was organized on March 5, 1941, for the purpose of effecting the merger of those carriers. On July 25, 1941, it made application under Section 5 of the Interstate Commerce Act for authority to acquire control, through purchase of capital stock, of the eight corporations involved, and to consolidate their operating rights and properties within one

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[1] The carriers involved were:

Arrow Carrier Corporation, Paterson, N. J. (hereinafter referred to as Arrow); Barnwell Brothers, Inc., Burlington, N. C. (hereinafter referred to as Barnwell); Consolidated Motor Lines, Inc., Hartford, Conn. (hereinafter referred to as Consolidated); Horton Motor Lines, Inc., Charlotte, N. C. (hereinafter referred to as Horton); McCarthy Freight System, Inc., Taunton, Mass. (hereinafter referred to as McCarthy); M. Moran Transportation Lines, Buffalo, N. Y. (hereinafter referred to as Moran); Southeastern Motor Lines, Inc., Bristol, Va. (hereinafter referred to as Southeastern); Transportation, Inc., Atlanta, Ga. (hereinafter referred to as Transportation). The total assets of the companies involved in the proposed merger exceeded $9,000,000.00 and the combined operating revenues for the year ended April 30, 1941, was $20,492,705.13 (R. 50, 145). The combined operating revenues of these companies (actual to April 30, balance estimated) for the year 1941 was $24,275,635.04 (R. 150).

year from the date of acquisition of control[2] (R. 9–10).

The carriers involved in the merger serve the principal points in Massachusetts, Rhode Island, Connecticut, New York, eastern Pennsylvania, New Jersey, Delaware, Maryland, the District of Columbia, Virginia, and North Carolina. Their routes also extend to Cleveland, Ohio, Pittsburgh, Pa., Nashville, Tenn., Great Falls and McColl, S. C., and to New Orleans, La., Pensacola, Fla., via Atlanta, Ga., and Montgomery, Ala., and pass through northeastern West Virginia. They operate approximately 3,300 units of revenue equipment, and the total highway mileage covered by their regular routes is 37,884. Some of the merging carriers also operate over irregular routes in the same territory, and McCarthy conducts certain contract-carrier operations (R. 11).

The merger includes the principal motor carriers operating along the Atlantic seaboard. Substantial competition among these carriers would be eliminated by the merger (R. 22).[3] The new company, Associated Transport, Inc., will be the largest common carrier of property by motor vehicle in the United States (R. 33). It will have operat-

[2] By separate application Associated Transport, Inc., sought authority under Section 214 of the Act to issue its own stock to enable it to acquire control of the eight carriers and of four associated noncarrier companies, and to provide funds for working capital and other corporate purposes.

[3] Competitive service over 13,546 route miles will be eliminated as a result of the merger (R. 22).

ing revenues ten times greater than any other motor carrier in the area where it operates. There will be no motor carrier or motor carrier system competitive with Associated Transport throughout its territory (R. 33). It will have routes extending over 24,338 highway miles from New York and Massachusetts on the north, to Louisiana and Florida, on the south (R. 22, 253, 1491).

The promoters made the consummation of the merger contingent upon the inclusion therein of the principal competitors in each part of the territory served. These are Barnwell, Consolidated, Horton, McCarthy, and Moran (R. 15, 36). In New England, Consolidated and McCarthy are competitive (R. 23). Consolidated and Moran are competitive between the principal points in New York State (R. 26). Barnwell and Horton are the principal competitors in the southern region (R. 27, 28).

A more ambitious proposal for acquisition of control of 29 motor carriers, including the carriers involved in the present merger, by another applicant, The Transport Company, was disapproved by the Commission on November 15, 1940 (36 M. C. C. 61). The Transport Company is controlled, through ownership of all its outstanding stock, by Kuhn, Loeb & Company, investment bankers of New York City (R. 11). Kuhn, Loeb & Company have been for many years, and still are, bankers for the Pennsylvania Railroad Com-

pany and the Baltimore & Ohio Railroad Company, two rail carriers operating in the territories served by the motor carriers involved in the present merger (R. 36).

The Transport Company is a stockholder in Associated Transport, Inc., having received 9,000 shares of its common stock for engineering and accounting data developed in connection with the previously proposed merger which the Commission disapproved. At the date of the hearing before the Commission on the present merger, The Transport Company had representation on the Board of Directors of Associated Transport, Inc. (R. 11). The plan as approved by the Commission's order of March 16, 1942, contemplated the inclusion of the Arrow Carrier Corporation, the stock of which the Transport Company had an option to purchase (R. 12); and thereby Kuhn, Loeb & Company, through the Transport Company, would have owned 6,877 shares of preferred stock and 67,167 shares of common stock, which, after issuance of 15,000 shares of preferred stock proposed to be issued to the public, would have been 13 percent and 9.53 percent, respectively, of the outstanding shares of Associated Transport, Inc. (R. 36).

After the institution of the present suit in the District Court to set aside the Commission's order of March 16, 1942, the Commission on June 8, 1942, upon petition of Associated Transport, Inc., vacated so much of its order of March 16, 1942,

as authorized the applicant to acquire control of, and consolidate with, Arrow. On June 17, 1942, the Commission's answer was amended so as to set forth that fact. The District Court treated the case as if the inclusion of Arrow in the proposed merger had never been contemplated by the parties or approved by the Commission, and disregarded the stock interest which Kuhn, Loeb & Company still holds in Associated Transport, Inc. (R. 66, 85).

In the proceedings before the Commission, the application for approval of the merger was opposed by the Secretary of Agriculture of the United States, the Antitrust Division of the United States Department of Justice, The National Grange, Super Service Motor Freight Company, Virginia State Horticultural Society, Inc., West Virginia State Horticultural Society, Maryland State Horticultural Society, Berks-Lehigh Mountain Fruit Growers, Inc., and Appalachian Apple Service, Inc. A number of other carriers, shippers, shipper organizations, and the Lynchburg, Va., Chamber of Commerce intervened but took no definite position (R. 10). The American Farm Bureau Federation filed a petition for leave to intervene and for rehearing and reconsideration on April 12, 1942, which, with the petitions of protestants for reopening, rehearing, reargument, and reconsideration, was denied by an order of the Commission entered April 22, 1942 (R. 498).

The Commission's order of March 16, 1942, approved the merger. Acting Chairman Aitchison dissented. Commissioner Splawn also dissented, pointing out that the alleged opportunities for greater economy and efficiency of operation were altogether vague and speculative and not convincing. He also emphasized that the unification was not an end-to-end consolidation of complementary lines, as the Commission asserted (R. 48). Commissioner Patterson also dissented, objecting to the inclusion of the McCarthy contract operation, which he regarded as amounting to a grant of dual authority. He also viewed part ownership of Associated Transport, Inc., by Kuhn, Loeb & Company as contrary to the public interest (R. 49).

McLean Trucking Company, Inc., a motor carrier which competes with some of the carriers included in the merger, brought suit on May 5, 1942, in the District Court to set aside the Commission's order (R. 1). The Secretary of Agriculture of the United States and the American Farm Bureau Federation intervened as plaintiffs (R. 61, 76). The United States confessed error (R. 72). The Interstate Commerce Commission and the parties to the merger defended the Commission's order. On December 28, 1942, the District Court dismissed the complaint (R. 89).

SPECIFICATION OF ERRORS TO BE URGED

1. The court below erred in that it did not set aside the Commission's order upon the following grounds:

a. The Commission, in making its finding under Section 5 (2) (b) of the Interstate Commerce Act that the merger would be "consistent with the public interest," erred as a matter of law in that it applied the standards and criteria applicable to a merger of rail carriers under the Transportation Act of 1920, instead of applying the standards and criteria prescribed by the Transportation Act of 1940 with respect to motor carriers.

b. The Commission, in making its finding that the merger would be "consistent with the public interest," erred by failing to consider and give due weight to the antitrust and other laws of the United States.

c. The Commission erred in concluding that Section 5 (11) of the Interstate Commerce Act (which provides that carriers participating in a merger approved by the Commission in accordance with the provisions of the Act are relieved from the prohibitions of the antitrust and other laws insofar as is necessary to enable them to carry into effect the merger so approved) relieved the Commission from the requirement of considering and giving due weight to the antitrust and other laws of the United States in making its

finding that the merger would be "consistent with the public interest."

d. The Commission erred in approving a merger of motor carriers involving the elimination of substantial competition without making a finding that the merger was necessary in order to insure adequate transportation service to the public.

e. The Commission erred in approving the merger without making a finding, under the provisions of Section 5 (2) (c) (1) of the Interstate Commerce Act, as to the effect of the merger upon adequate transportation service to the public.

f. The Commission erred in approving the merger without making a finding that the effect thereof would be consistent with the National Transportation Policy (as stated in the Transportation Act of 1940) to preserve the inherent advantages of motor carrier transportation.

g. The Commission erred in failing to apply the proviso of Section 5 (2) (b) of the Interstate Commerce Act and to make a finding as to whether the merger would enable carriers by railroad to use service by motor vehicle to public advantage in their operations and would not unduly restrain competition.

2. The court below erred in failing to consider the important public questions arising under Section 5 (2) (b) and in eliminating from the case all phases of the controversy resulting from the

inclusion of Arrow Carrier Corporation in the authorized merger.

3. The court below erred in holding that the facts found and reported by the Commission were based upon substantial evidence and in adopting them as its own findings.

4. The court below erred in holding that the order approving the proposed consolidation was made by the Commission in accordance with the facts and the applicable law and was valid.

SUMMARY OF ARGUMENT

I

The Commission misconstrued applicable provisions of law and did not apply the appropriate statutory standards. The Commission applied the standards and criteria prescribed by the Transportation Act of 1920 with respect to the merger of rail carriers instead of applying the standards and criteria prescribed by the Transportation Act of 1940 with respect to motor carriers. The legislative history of Section 5 of the Interstate Commerce Act shows that the policies and provisions embodied in the antitrust laws are incorporated in the statutory standards and criteria applicable to the acquisition of control of motor carriers. But the Commission's construction of that section would deprive the antitrust laws of applicability except at the whim or ca-

price of the Commission. Section 5 (11), properly construed, does not relieve the Commission from applying and giving effect to the antitrust laws. That provision is addressed to carriers, not to the Commission. It merely exempts the carriers from prosecution if they comply with Commission orders. But the Commission may not properly approve a merger which would violate the antitrust laws unless it is necessary in order to provide adequate transportation service for the public.

II

The Commission did not make the necessary findings. The Commission made no finding that existing motor-carrier services were inadequate. The Commission made no finding as to the effect of the merger upon adequate transportation service to the public, as required by Section 5 (2) (c) (1) of the Act. The Commission made no finding that the merger would be consistent with the National Transportation Policy of preserving the inherent advantages of motor transportation.

III

Findings made by the Commission lack support in the evidence. The Commission found that the proposed unification is predominantly an end-to-end consolidation of complementary operations. The Commission found that Associated Transport, Inc., is not, and would not be, affiliated with

any railroad. These findings are not supported by evidence.

IV

The Commission's supplemental order, vacating in part its order of March 16, 1942, did not render moot the important public questions arising under the proviso of Section 5 (2) (b).

ARGUMENT

I

THE COMMISSION MISCONSTRUED APPLICABLE PROVISIONS OF LAW AND DID NOT APPLY THE APPROPRIATE STATUTORY STANDARDS

Under well-settled doctrine as to the scope of judicial review, an order of the Commission may be set aside by the courts for mistake of law or for failure to apply the proper statutory standards. *Interstate Commerce Commission* v. *Union Pacific Railroad Company*, 222 U. S. 541, 547 (1912); *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 488–90 (1942); *Scripps-Howard Radio, Inc.*, v. *Federal Communications Commission*, 316 U. S. 4, 10 (1942).

A. THE COMMISSION APPLIED THE STANDARDS AND CRITERIA PRESCRIBED BY THE TRANSPORTATION ACT OF 1920 WITH RESPECT TO THE MERGER OF RAIL CARRIERS INSTEAD OF THOSE PRESCRIBED BY THE TRANSPORTATION ACT OF 1940 WITH RESPECT TO MOTOR CARRIERS.

In the case at bar the Commission misconstrued the applicable provisions of law and did not apply the appropriate statutory standards. This is strik-

ingly shown by the fact that, in dealing with a merger of motor carriers, the Commission applied the standards and criteria prescribed by the Transportation Act of 1920 with respect to a merger of rail carriers instead of applying the standards and criteria prescribed by the Transportation Act of 1940 with respect to motor carriers.[4] The Commission adopted and applied a policy of encouraging the consolidation of motor carriers into large and powerful systems.[5] The Commission asserts

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[4] The Commission's erroneous construction was followed by the court below:

"Public interest is a proper standard in that it embraces in respect to public transportation service what is adequate, economical, efficient, necessary, and therefore appropriate to serve the public need. *New York Securities Corp.* v. *United States*, 287 U. S. 12. Such changes in the Transportation Act of 1920 as were brought about by the Emergency Railroad Transportation Act of 1933 kept this standard of action fully applicable. *Texas* v. *United States*, 292 U. S. 522. *The Motor Carrier Act of 1935 and the Transportation Act of 1940 applied like principles to the regulation of common carriers by motor vehicles.*" [Italics supplied.] (R. 87: 48 Fed. Supp. 933, 937.)

[5] The Commission's report (38 M. C. C. 137, 162–3) states:

"The large size of a motor carrier which would result from a unification alone does not constitute sufficient ground for denial of an application. Application of such a policy would tend to freeze the motor-carrier industry at its present level. Such transportation, compared with rail and water transportation, is still in its infancy, and arbitrary restrictions upon its natural development into larger units solely by reason of comparative size would not be in the public interest. There are many thousands of motor carriers of property subject to our jurisdiction. Many of these are very small, and small motor carriers are necessary and have

that "The legislative history of section 5 indicates a clear Congressional intent to encourage unifications, particularly of railroads." It is submitted that the Commission has here fallen into a complete misconception of the policy expressed by the Congress and a grievous misconstruction of the applicable statutes.

The legislative history of Section 5 of the Interstate Commerce Act shows that it was originally enacted as a restraint upon combinations of carriers, quite similar in purpose and intent to the prohibitions embodied in the antitrust laws; that because of the financial plight of the railroads following the first World War, the Transportation Act of 1920 modified Section 5 with a view to encouraging mergers of rail carriers (and only

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a definite place in the industry. On the other hand, it would seem that larger motor-carrier systems, comparable in size and strength with units of competing forms of transportation, should also have their place in the industry. *The legislative history of section 5 indicates a clear Congressional intent to encourage unifications, particularly of railroads.* In view of the national transportation policy, as declared in the act, it cannot be supposed that Congress intended that the motor-carrier industry, a coordinate and competing form of transportation, should not also be permitted to grow through consolidations, or that the mere size of the consolidated company should, of itself, be sufficient to warrant denial. Considering the much greater number of motor carriers of property and their size as compared with railroads generally, *the need for unification in the trucking field is at least as great as in the case of railroads*, which have had many years of development and now comprise comparatively few systems." [Italics supplied.]

rail carriers were involved, motor carriers not then being subject to federal regulation); that the congressional policy with respect to motor-carrier mergers, as embodied in Section 213 of the Motor Carrier Act of 1935, contained no provisions similar to the modifications adopted with respect to rail mergers by the Transportation Act of 1920, but on the contrary sought to give effect to the policies of the antitrust laws and to prevent the domination of the motor-carrier industry by influences connected with the railroads; and that the Transportation Act of 1940, in combining into a single section the merger provisions applicable to rail, motor, and water carriers, did not alter or modify the policies theretofore in force with respect to mergers of motor carriers.

A brief review of the legislative history of Section 5 of the Interstate Commerce Act, as amended, will demonstrate the soundness of the foregoing propositions. Section 5 of the original Interstate Commerce Act of 1887 was an absolute prohibition against the pooling of traffic of different and competing railroads, or any division of their earnings.[6] The spirit and purpose of this prohibition is substantially identical with that which led to the passage, three years later, of the

[6] 24 Stat. 380. The Panama Canal Act of August 24, 1912, 37 Stat. 566, added a new paragraph making it unlawful for a railroad to have any interest in a water carrier operated through the Panama Canal or elsewhere with which it does, or may, compete.

Sherman Act.[7] Indeed, these antipooling provisions may be regarded as the beginning of federal antitrust legislation.

No relaxation of these restraints was authorized by the Congress until the Transportation Act of 1920, whereby Section 5 of the Interstate Commerce Act was extensively amended.[8]

Paragraph (1), as amended, provided that the pooling of traffic or earnings should remain unlawful "except upon specific approval by order of the Commission as in this section provided." A proviso to this paragraph declared that "whenever the Commission is of opinion * * * that the division of their traffic or earnings, to the extent indicated by the Commission, will be in the interest of better service to the public, or economy in operation, and will not unduly restrain competition, the Commission shall have authority by order to approve and authorize" such division of traffic or earnings under just and reasonable rules and regulations.[9]

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[7] Sherman Act of July 2, 1890, 26 Stat. 209.

[8] 41 Stat. 456, 480–2. Section 5, as amended in 1920, is reproduced in the Appendix hereto.

[9] Regarding this amendment, Senator Cummins, sponsor in the Senate of the 1920 Act, said:

"It is apparent, Mr. President, that this provision is not only an important one but is a radical departure from the policy which we have heretofore pursued. * * * I have thought it my duty to refer to it, because it is, as I have indicated, a substantial departure from the policies we have so long pursued." [Congressional Record, Vol. 59 (66th Cong. 2nd Sess.), p. 141].

The above and other provisions of the Transportation Act of 1920 marked a new departure in railroad regulation, as many decisions of this Court have made clear.[10] Among such provisions were those designed to encourage consolidations of railroads. Senator Cummins, co-author of the 1920 Act, was convinced that no remedy but consolidation would relieve the plight of the railroads.[11] The bill which passed the Senate called for compulsory consolidation, but the conferees re-

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[10] In *Wisconsin Railroad Commission* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563, 585 (1922), this Court said:

"It is manifest from this very condensed recital that the act made a new departure. Theretofore the control which Congress through the Interstate Commerce Commission exercised was primarily for the purpose of preventing injustice by unreasonable or discriminatory rates against persons and localities, and the only provisions of the law that inured to the benefit of the carriers were the requirement that the rates should be reasonable in the sense of furnishing an adequate compensation for the particular service rendered and the abolition of rebates. The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in § 15a to be one of the purposes of the bill."

Other decisions of this Court demonstrate wherein the Transportation Act of 1920 effected a new departure with respect to rail carriers: *New England Divisions Case*, 261 U. S. 184, 189 (1923); *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456, 478 (1924); *Texas & Pacific Ry. Co.* v. *Gulf, etc., Ry. Co.*, 270 U. S. 266, 277 (1926); *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 24–25 (1932); *Texas* v. *United States*, 292 U. S. 522, 530 (1934).

[11] Congressional Record, Vol. 59 (66th Cong., 2nd Sess.), pp. 131–135.

jected so extreme a step and adopted the language which appears in the statute as enacted.[12] It is plain, however, that the act as passed was intended to encourage railroad consolidations rather than to restrain them.

Paragraph (2) empowered the Commission to approve and authorize the acquisition by one rail carrier "of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation" whenever the Commission is of opinion that such acquisition "will be in the public interest."[13]

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[12] Congressional Record, Vol. 59 (66th Cong., 2nd Sess.), p. 3327 (statement by Senator Cummins). See also p. 3264 (statement by House managers); pp. 3052–3 (text of amended Section 5 in conference report); p. 3316 (conference report agreed to by House); p. 3350 (agreed to by Senate).

[13] It was apparent that under the 1920 Act acquisitions would be merely a temporary expedient to forestall a railroad collapse because of the inability of the Commission to approve any consolidation until it had drawn up a plan for the consolidation of the roads of the country into several systems. *Snyder* v. *New York C. & St. L. R. Co.*, 118 Ohio St. 72 (1928); aff'd. 278 U. S. 578. This plan was not formulated until December 1929 (159 I. C. C. 522; 185 I. C. C. 403). Thereafter Congress, in the Emergency Railroad Act of 1933, consolidated the acquisition and consolidation paragraphs of old section 5 into one paragraph, and provided that the Commission could approve an acquisition or a consolidation only if it would "promote the public interest" and was in accordance with its plan for the consolidation of the railroads of the country into several large systems.

Paragraph (4) required the Commission to prepare and adopt as soon as practicable "a plan for the consolidation of the railway properties of the continental United States into a limited number of systems," and added that "competition shall be preserved as fully as possible and wherever practicable the existing routes and channels of trade and commerce shall be maintained."[14]

Paragraph (6) provided that: "It shall be lawful for two or more carriers by railroad * * * to consolidate their properties or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership, management, and operation" provided certain specified conditions were met: (a) the proposed consolidation must be in harmony with the Commission's plan of consolidation, and must be approved by the Commission; (b) the bonds and stock of the consolidated corporation must not exceed the value of the consolidated properties; (c) an application for a proposed consolidation must be presented to the Commission, and if after hearing "the Commission finds that the public interest will be promoted by the consolidation and that the conditions of this section have been or will be fulfilled, it may enter an order approving and authorizing such consoli-

[14] The Transportation Act of 1940 repealed the provisions relating to preparation and adoption by the Commission of such a general plan. Congressional Record (76th Cong., 3rd Sess.), Vol. 86, p. 11768.

dation," and thereupon such consolidation may be effected notwithstanding the law of any State or the decision or order of any State authority to the contrary.

Paragraph (8) relieved the "carriers affected by any order made under the foregoing provisions of this section and any corporation organized to effect a consolidation approved and authorized in such order" from "the operation of the 'antitrust laws' * * * and of all other restraints or prohibitions by law, State or Federal, insofar as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section."

The Transportation Act of 1920 was intended not so much to restrain the railroads for the benefit of the public, which had been the Congressional purpose in previous regulatory enactments, but to benefit the financially distressed carriers by encouraging consolidations into regional systems and prescribing rates which would insure a "fair return" to the carriers as a whole. In this latter connection, "recapture" provisions were included, which were intended to require the strong railroads to pay one-half of their earnings in excess of a "fair return" into a fund for the benefit of the weaker roads.[15]

[15] The "recapture" provisions were repealed retroactively by the Emergency Railroad Transportation Act of 1933, 48 Stat. 220.

The Emergency Transportation Act of 1933[16] confirmed and carried forward the new railroad policy introduced in 1920 Act. This Court held, in *Texas* v. *United States, supra,* that one of the primary aims of that policy is the avoidance of "waste," that is, the elimination of duplicate facilities, to achieve which Congress prescribed standards to guide the Commission in the exercise of its authority over acquisitions and consolidations of rail carriers under the Act. The Court said:

> The authority given to the Commission to authorize consolidations, purchases, leases, operating contracts, and acquisition of control, was given *in aid of that policy. New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 24, 25. [Italics supplied.][17]

And it is that policy and those standards which the Commission specifically applied to the merger of motor carriers in the instant case by express reference to the above decision (R. 18).[18] Therein lies the basic error of law in the Commission's report and order.

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[16] 48 Stat. 211.

[17] 292 U. S. 522, 530–1. This policy, which led to the elimination of competition between railroads in services and facilities, was implemented by the provision for a Federal coordinator and regional committees of carrier representatives, which functioned until June 15, 1936. 48 Stat. 211–213. No such machinery was ever established for motor carriers.

[18] The Court below likewise relied upon the *New York Central Securities* and the *Texas* cases (R. 87).

The 1933 Act again amended Section 5 of the Interstate Commerce Act.[19] The distinction between "acquisition of control" and "consolidation into a single system" was eliminated. Paragraph (4) of Section 5 provided a single procedure for dealing with the several methods of merger, and declared that such unification "shall be lawful" if effected "with the approval and authorization of the Commission, as provided in subdivision (b)." Subdivision (b) of that paragraph provided that if the Commission finds that "the proposed consolidation, merger, purchase, lease, operating contract, or acquisition of control will be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3), and will promote the public interest, it may enter an order approving and authorizing such consolidation. * * *" Paragraph (6) prohibited "control or management in a common interest," in whatever manner effected, except as provided in paragraph (4).[20] Paragraph (15) reenacted with only verbal changes the provisions relieving the carriers from the operation of the antitrust laws and other restraints

[19] 48 Stat. 217-220.

[20] In the *Nickel Plate* case, 79 I. C. C. 581, the Commission had held (Commissioner Eastman dissenting) that its approval was not necessary, under Section 5 as amended by the Transportation Act of 1920, for a merger not violative of the antitrust laws, but that the consolidation might be effected under State law. *Snyder* v. *N. Y., C. & St. L. R. Co.*, 118 Ohio St. 72, 85 (1928); aff'd, 278 U. S. 578.

imposed by, or under authority of, state or federal law.

From the foregoing it is clear that the policy and criteria applied by the Commission would have been appropriate in a merger of rail carriers, in view of the expressed intent and purpose of Congress to encourage consolidations of such carriers, but the Commission and the court below erred in holding that the same policy and criteria were applicable to mergers of motor carriers.

B. THE STANDARDS AND CRITERIA APPLICABLE TO MERGER OF MOTOR CARRIERS INCLUDE THE POLICY AND PROVISIONS OF THE ANTITRUST LAWS

As stated above, the prohibition against pooling of traffic or earnings by rail carriers contained in Section 5 of the original Interstate Commerce Act, enacted in 1887, was in fact the first federal antitrust law. It was supplemented in 1890 by the Sherman Act,[21] Resort to "the

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[21] In a textbook by William L. Snyder, The Interstate Commerce Act and Federal Anti-Trust Laws (1904), 121–122, the author points out that—

"Notwithstanding the stringent provisions of Section 5, combinations in restraint of trade became so formidable that on July 2, 1890, Congress passed the Sherman Act, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies.' The provisions of the act were made universal in their application to reach the heart of the evil sought to be remedied. It declares that 'every contract' in restraint of trade or commerce is unlawful. It is immaterial, therefore, whether such a contract, if it affects interstate commerce, is made with the carrier, shipper, manufacturer, or producer. The contract, if it restrains trade and commerce, is unlawful. *The Sherman Act, with reference to*

history of the times when it was passed."[22] shows that public opinion in the United States regarded with the same grave concern the abuses practiced by railroads and those engaged in by other "trusts."[23] By 1920, however, the railroads had become the object of Congressional solicitude because of their weakened financial condition; and a policy was adopted of encouraging their consolidation into a limited number of systems in order to relieve their distress and to enable them to render adequate service to the public.

With respect to motor carriers, however, there has been no occasion for such solicitous and exceptional treatment.[24] Hence, it was not necessary

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the Commerce Act, is practically supplemental legislation. Its effect and operation is to broaden the provisions of Section 5 so as to embrace not only carriers, but manufacturers and producers as well." [Italics supplied.]

[22] *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 319 (1897). See also *United States* v. *Joint Traffic Association*, 171 U. S. 505, 565 (1898); and *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 212 (1940).

[23] Indeed, rebates from railroads constituted one of the means by which the Standard Oil Company attained its "bad eminence." Ida M. Tarbell, The History of the Standard Oil Company (1904), II, 67, 77.

[24] Indeed, it was the success which motor carriers enjoyed in competing with the railroads which led to passage of the Motor Carrier Act of 1935. The railroads argued that competing forms of transportation ought not to remain unregulated, and State regulation was impossible under *Buck* v. *Kuykendall*, 267 U. S. 307, 315 (1925). Thus, regulation of motor carriers was not undertaken for the protection of shippers against high rates, but for the protection of rail carriers against low rates resulting from unregulated competition by

for the Congress to relax its original antitrust policy by encouraging consolidations of such carriers. Consequently, so far as the merger of motor carriers is concerned, the Congressional policy condemning restraints of trade and elimination of competition remained in force. It is therefore submitted that the statutory language relating to such mergers should receive an interpretation recognizing the Commission's duty to be guided by, and to give effect to, that policy. The Commission's action with respect to motor carrier mergers under Section 5 should be inspired by the philosophy of competitive enterprise underlying American antitrust legislation, and should be shaped in accordance with the doctrine developed by the courts in dealing with

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motor carriers. James C. Nelson, "The Role of Regulation Reexamined," National Resources Planning Board, Transportation and National Policy (1942), 197, 202–3. At the time, not all members of the Interstate Commerce Commission were sure that regulation of motor-carrier rates and restrictions upon the right to enter the business were necessary or desirable. Commissioner Woodlock said:

"I concur in this report with reservations. Regulation is not in itself a good thing. The less regulation that is necessary, other things being equal, the better for the community. It is necessary in the case of public-service utilities because of their semimonopolistic nature. Transportation in general is not *per se* of such nature; transportation by railroad is. Transportation by motor bus and motor truck does not necessarily depend upon monopolistic or semimonopolistic organization or performance. It is manifest that at the present time these services are much more largely of a competitive than of a monopolistic nature. For that reason the need for

enforcement of those laws.[25]

It is plain that the true function of the Commission in supervising mergers of motor carriers is not to encourage such consolidations, but to exercise a restraining influence upon the plans of "economic empire-builders" in the motor-transportation field. The Commission's scrutiny of a proposed merger should be as vigilant and painstaking, and should proceed upon the basis of the same economic postulates and presumptions, as an investigation into the same matter by the Antitrust Division of the Department of Justice to determine whether there is any evidence of illegal combination.

Indeed, the provisions of Section 5, insofar as motor-carrier mergers are concerned, should be

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regulation, except insofar as concerns the public safety, is not wholly clear. * * * [*Motor Bus and Truck Operation*, 140 I. C. C. 685, 750.]"

During debates on the bill, assurance was given by its sponsor, Senator Wheeler, that the new legislation would not be used for the purpose of increasing truck rates to the rail level. Congressional Record (74th Cong., 1st Sess.), Vol. 79, pp. 5650, 5735. As a matter of fact, however, there is considerable evidence to the effect that through concerted action by rail and motor-carrier rate bureaus, a program to increase motor rates up to the rail level has been pursued. Hearings before the Committee on Interstate Commerce, United States Senate (78th Cong., 1st Sess.), on S. 942 (1943), Part II, p. 464, *et seq.*

[25] The Commission, like the courts, must accept the determination of Congress that interstate commerce shall be governed by the rule of competitive enterprise, regardless of such conflicting views as may be entertained by economists. *Trenton Potteries Co.* v. *United States*, 273 U. S. 392, 397 (1927).

regarded as establishing a procedure for enforcing the policies embodied in the antitrust laws more effectively than is possible by means of the remedies available to the Department of Justice.[26] The economic results of criminal and civil litigation are often negligible, and parties willing to risk the burdens of such litigation cannot normally be prevented from consummating their plans for the elimination of competition before the Department of Justice has an opportunity to act. What may well be regarded as a more effective means of ensuring compliance by motor carriers with the requirements of the antitrust laws is provided by Section 5. Prior administrative approval is required before a merger may be effected.[27] Under this procedure, if vigilantly and earnestly administered, it should be possible to thwart monopolistic combinations "in their incipiency," rather than merely to dissolve them at a later stage, "with unsatisfactory results so far as the purpose to maintain free competition is

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[26] Concurrent civil suits and criminal prosecutions are the only weapons at the disposal of the Department of Justice. *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 52 (1912).

[27] This is not the case in the enforcement of the antitrust laws by the Department of Justice. See Thurman W. Arnold, *The Bottlenecks of Business* (1940), 144; Milton Katz, *The Consent Decree in Antitrust Administration*, 53 Harv. L. Rev. (1940) 415, 434, 440–2; *Report of the Attorney General of the United States* (1938) 64; *Report of the Attorney General of the United States* (1928), 31; *Report of the Attorney General of the United States* (1927), 25.

concerned."[28] Since often "it is not possible to resurrect the competitors who have been slain,"[29] the competitive status quo cannot be restored, once competition has been eliminated.

This interpretation of the applicable statutory provisions is strongly supported by their legislative histories. In enacting Section 213 of the Motor Carrier Act of 1935,[30] Congress did not intend to encourage mergers of motor carriers but to subject them to strict government supervision. Senator Wheeler, in charge of the measure in the Senate, said:

> At present most truck operations are small enterprises. However, there are many rumors of plans for the merging of existing operations into sizeable systems. In

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[28] *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 356 (1922).

[29] *Patterson* v. *United States*, 222 Fed. 599, 625 (C. C. A. 6, 1915).

[30] The substance of Section 213 of the Motor Carrier Act of 1935 was incorporated in Section 5 of the Interstate Commerce Act by the Transportation Act of 1940. This amendment was wholly for convenience, and did not alter the meaning of the provisions relating to motor carriers. It brought together in one section the merger provisions applicable to all types of carriers subject to the Commission's regulatory jurisdiction. Congressional Record (76th Cong., 3rd Sess.), vol. 86, pp. 5853–4, 10166–7, 11543, 11546, 11768. The mere fact, however, that the same verbal formula is applicable does not mean that the same substantive standards should be applied by the Commission to all types of merger. *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 433–4, (1932); *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 315 (1936).

> view of past experience with railroad and public utility unifications, it is regarded as necessary that the Commission control such developments, where the number of vehicles involved is sufficient to make the matter one of more than local importance.[31]

This language clearly indicates the intention of the framers of the Motor Carrier Act that the Commission should restrain rather than encourage mergers. This is particularly true with respect to mergers involving the acquisition of control of motor carriers by railroad interests. Specific provisions in the law prohibit such control except under the most limited conditions and then only after certain specific findings. Regarding these provisions, Senator Wheeler said:

> With this limitation, it will be possible for the Commission to allow acquisitions which will make for coordinated or more economical service and at the same time protect the public against a monopolization of highway carriers by rail, express, or other interests.

Mr. Sadowski, in the House of Representatives, likewise explained the intention of the Committee on Interstate Commerce.

> Section 213 provides that the Commission shall control the consolidation, merger, and acquisition of control of motor carriers. I will say in this respect that it is the intent

[31] Congressional Record (74th Cong., 1st Sess.), vol. 79, pp. 5654–5.

> and it is important to the welfare and progress of the motor-carrier industry, that the acquisition of control of the carriers be regulated by the Commission so that the control does not get into the hands of other competing forms of transportation, who might use the control as a means to strangle, curtail, or hinder the progress of highway transportation for the benefit of the other competing transportation.[32]

From the foregoing statements made by the sponsors of the Act, it is obvious that Congress did not intend to adopt for motor-carrier mergers the same policy of consolidation which conditions had compelled it to adopt for rail carriers. Congress had no intention of encouraging mergers in the motor-carrier field. On the contrary, it perceived the necessity for vigilant scrutiny of such transactions by a public agency, in order that the traditional American policy of competitive enterprise might be preserved throughout the motor-carrier industry and in the relations of that industry with other forms of transportation.

C. SECTION 5 (11) OF THE INTERSTATE COMMERCE ACT, PROPERLY CONSTRUED, DOES NOT RELIEVE THE COMMISSION FROM APPLYING AND GIVING EFFECT TO THE ANTITRUST LAWS

The Commission construed Paragraph 11 of Section 5 as placing wholly within its hands, regardless of and unfettered by the provisions and

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[32] Congressional Record (74th Cong., 1st Sess.), vol. 79, p. 12206.

policies embodied in the antitrust laws, the power to grant or deny mergers of motor carriers. The Commission's claim to such power is stated, as follows (R. 22):

> In our opinion, the Congress intended to place wholly within our judgment the granting or denying of authority for these transactions under Section 5.

It is submitted that this is an erroneous interpretation of the pertinent statutory provision. The Congress did not intend to delegate to the Commission a naked power to act as it saw fit, or to deprive the antitrust laws of applicability except at the whim or caprice of the Commission; on the contrary, Congress conferred upon the Commission a jurisdiction to be exercised in accordance with the declared policy of Congress and the prescribed statutory standards and criteria.

This distinction between *power to decide* and *rule of decision* may be illustrated by two analogies. The first is taken from international law. The difference is similar to that between a tribunal which is entrusted with jurisdiction to settle an international controversy in accordance with applicable rules of law, and one whose function is simply to render a binding decision which will terminate the dispute, regardless of legal rules.[33]

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[33] As to types of international arbitration and judicial settlement, see Elihu Root, *Addresses on International Subjects* (1916), 148; James Brown Scott, *Sovereign States and Suits* (1925), 242–5.

Another illustration of the distinction between power to decide and rule of decision is shown by the statutory requirement that "The laws of the several States * * * shall be regarded as *rules of decision* in trials at common law, in the courts of the United States." [Italics supplied.][34] The *power to decide* possessed by such courts, however, is conferred by an entirely distinct section of the Judicial Code.[35]

The Court will note that Section 5 (11) does not relieve the Commission from applying and giving effect to the antitrust laws; it is operative only upon the *carriers* and not upon the *Commission*. The provision merely relieves the carriers from the operation of the antitrust laws (and of all other restraints, limitations and prohibitions of Federal, State, or municipal law) insofar as may be necessary to enable them to carry into effect the transactions approved by the Commission. The provision is not addressed to the Commission, and does not contain any directions to that body with respect to the standards and criteria to be applied when passing upon a proposed transaction. The provision deals with the *effect* of the Commission's order, rather than with the *rules of decision* by which the Commission is to

[34] 28 U. S. C. 725.

[35] 28 U. S. C. 41. The jurisdiction, organization, and functioning of United States courts are not affected by State law. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 365–6 (1886); *Herron* v. *So. Pacific Co.*, 283 U. S. 91, 94 (1931).

be governed in making such order. It is similar to a provision which exempts from punishment a soldier acting in accordance with the orders of his superior officer, but does not constitute a directive for the guidance of such officer in issuing orders.[36]

It follows that, so far as the statutory standards and criteria to be followed by the Commission in reaching its decision are concerned, Paragraph 11 of Section 5 may be completely disregarded. The rules of decision to be applied by the Commission must be found elsewhere. The long-established policy embodied in the antitrust laws constitutes one of the sources from which the Commission is to derive such rules.

D. THE STATUTORY STANDARDS AND CRITERIA TO BE APPLIED BY THE COMMISSION, UNDER THE TRANSPORTATION ACT OF 1940, TO MERGERS OF MOTOR CARRIERS, INCLUDE MORE THAN MERE "TRANSPORTATION CRITERIA"

In addition to the antitrust laws, the Commission must take into account such other standards and criteria as are included within the general statutory concept of "public interest." These standards and criteria are not limited to mere "transportation criteria," as the Commission asserts,[37] but relate also to the broader aspects of public interest, which transcend routine consid-

[36] See *Restatement of the Law of Torts* (1934), I, § 146, p. 343: "A soldier may be privileged to obey an order which the superior who gives it should recognize as being clearly beyond his discretion to give."

[37] Brief of Interstate Commerce Commission in the court below, pp. 26, 36.

erations of carrier interest. The Commission disregarded these broader considerations, as did the court below, and limited itself to a consideration of certain transportation criteria[38] relating to "the attainment of the ends Congress sought to accomplish under the Interstate Commerce Act administered by the Commission" (R. 87). In so narrowing its vision, the Commission disregarded the principle which was enunciated by this Court in *Southern Steamship Co.* v. *National Labor Relations Board,* 316 U. S. 31, 47 (1942), as follows:

> It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

A similar holding that an administrative body charged with determination of questions as to public interest, convenience, and necessity, should take account of the antitrust laws is found in this Court's decision in *National Broadcasting Co.*

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[38] The "transportation criteria" utilized by the Commission related to such matters as anticipated economies, anticipated improvements in the use of equipment, and simplification of corporate dealings with regulatory agencies (R. 18).

v. *United States*, 319 U. S. 190, 215, 223 (1943).

The Interstate Commerce Act itself enumerates certain standards to be applied by the Commission. That Act makes it the duty of the Commission to insure adequate transportation service. This is evident from a reading of the declaration of the National Transportation Policy in the Act.[39] Congress again emphasizes this objective in Section 5 (2) (c), wherein it specifically directs the Commission to give weight to certain considerations, one of which is "The effect of the proposed transaction upon adequate transportation service to the public."

It is clear that the statute is framed on the assumption that this criterion calls for denials as well as approvals of applications to merge carriers for hire. The Act does not permit the merger of strongly competing motor carriers into a vast system if adequate transportation can be maintained or achieved without such merger. Nor does it permit mergers which involve attempts to monopolize transportation services.

On the other hand, if present transportation service is clearly inadequate, it becomes the duty of the Commission to approve such proposed mergers as will remedy the evil. Such judgments are safeguarded in that the Commission is dealing with present existing facts which can be examined. Evidence can be taken as to who is suffering

[39] 54 Stat. 899.

from lack of adequate service and why. Economies in operation may be approved, but not at a price which involves undue restraint of competition. Remedies which involve some restraint of competition can be limited to curing the specific evils found. In short, public policy looks to private initiative in a competitive system to bring about future betterments of service. The Commission's concern and duty is to insure that the public does not suffer from lack of adequate service while the competitive race is going on. This is the spirit and principle of the Interstate Commerce Act.

Furthermore, the Commission is directed by the National Transportation Policy to preserve the inherent advantages of each type of transportation. These inherent advantages in motor-carrier transportation, which will be considered hereinafter, are to be achieved through competition and not regulated monopoly.

E. THE COMMISSION MAY NOT PROPERLY APPROVE A MERGER WHICH WOULD VIOLATE THE ANTITRUST LAWS UNLESS NECESSARY IN ORDER TO PROVIDE ADEQUATE TRANSPORTATION SERVICE

A proper interpretation of Section 5 requires consideration of all applicable provisions of law from which the foregoing rules of decision are derived. Such an interpretation impels the conclusion that the Commission should not approve a merger of motor carriers which would otherwise violate the antitrust laws unless such action

is necessary to provide adequate transportation service for the public. Circumstances are conceivable in which, due to physical conditions or the absence of sufficient traffic to support more than one carrier, the Commission might possibly find that a monopolistic situation violating the antitrust laws was none the less necessary in order to provide adequate transportation service for the public.

But it is submitted that a merger otherwise illegal under the antitrust laws should not be authorized unless it is necessary to provide adequate service for the public. Lesser matters of mere convenience (such as improved equipment or increased economy in operation) are not sufficient to warrant departure from the settled policies of the law.[40]

It follows that the correct interpretation of Section 5 is that, before it may authorize a merger violative of the antitrust laws, the Commission must determine that existing motor carrier service is inadequate and that the proposed merger is nec-

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[40] The distinction here urged resembles that often applied in determining whether the required *quantum* of proof of "public convenience and necessity" has been offered in behalf of a new service when there is already in the field an adequate existing service. It is ordinarily held, in such cases, that more must be proved than that some improvement in service will result, or that the new service will be slightly superior in some respects, or more convenient than the existing service. Lake, *Competition in the Public Utility Fields*, 10 Mississippi L. J. (1938) 197, 215-6, 219, and decisions therein cited.

essary in order to provide adequate transportation service for the public.

The above sets forth the important statutory standards and criteria which are applicable to mergers of motor carriers under the Transportation Act of 1940 [41] and which, as has been shown, are different from those prescribed (for railroad mergers) in prior transportation acts. Summarized, the criteria applicable in this case are:

1. The proposed merger must be "consistent with the public interest" in the broad sense hereinabove outlined, which includes not merely the technical "transportation criteria" which the Commission applied but also other applicable rules of decision, including the antitrust laws;

2. Adequate transportation service must be maintained, and the Commission must consider the effect of the proposed merger upon adequate transportation service to the public;

3. Hence, substantial competition must not be eliminated unless necessary to maintain or achieve adequate transportation service;

4. Likewise, mergers of motor carriers which involve attempts to monopolize motor-carrier service over the public highways must not be approved;

5. The inherent advantages of motor-carrier transportation must be preserved; and,

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[41] 54 Stat. 899.

6. Hence, the Commission may not authorize mergers through which railroad interests obtain domination or control of motor-carrier transportation.

II

THE COMMISSION FAILED TO MAKE NECESSARY FINDINGS

Under established principles of judicial review, an order of the Commission may be set aside for failure to make necessary findings. *Florida* v. *United States*, 282 U. S. 194, 215 (1931); *United States* v. *C., M., St. P. & P. R. Co.*, 294 U. S. 499, 504–5 (1935).

It is submitted that in the case at bar the Commission failed to make necessary findings.

A. THE COMMISSION MADE NO FINDING THAT EXISTING MOTOR-CARRIER SERVICES WERE INADEQUATE

As demonstrated above, the proper construction of Section 5 of the Interstate Commerce Act requires the Commission to refrain from approving a merger of motor carriers, otherwise violative of the antitrust laws, unless such merger is necessary to insure adequate transportation service to the public. Accordingly, an essential finding which the Commission must make is that existing motor-carrier service is inadequate. No such finding was made by the Commission in the present case. The Commission merely found that certain improvements in service would result from the

merger through interchange of equipment,[42] that simplified relations with shippers and regulatory bodies would result, and that certain economies would be effected through greater purchasing power and by savings in general and administrative expenses (R. 15–18).[43] Manifestly a finding

[42] Although the Commission admitted that theoretically this advantage could be obtained without consolidation (R. 16).

[43] Commissioner Splawn regarded the alleged prospects for economies as vague and speculative (R. 48). His judgment was vindicated by subsequent events as shown by the Commission's report in *Increased Common Carrier Truck Rates in the East*, 42 M. C. C. 633, 646. The Commission there said:

"The operating rights and properties of seven motor common carriers were consolidated in Associated pursuant to the authority granted in *Associated Transport, Inc.—Control and Consolidation*, 38 M. C. C. 137. The consolidation was not completed until January 1, 1943. The data for the first quarter of 1943 in the foregoing table represent the results of the first 3 months of combined operation. *In seeking approval of the consolidation, the proponents contended that numerous economies would result and the combined operation would be more efficient than the separate operations of the individual companies. The predicted economies apparently were not realized* in the first quarter of 1943, and the increase in operating expenses over those of Associated's predecessors cannot be explained solely by increased labor costs or other increased costs of record. We are not unmindful that, in such a large merger of motor carriers, economies and increased efficiency of combined operation cannot be put into effect immediately. It is apparent from an examination of the foregoing table that the operations of Associated during the first quarter of 1943 are not typical of those of the other respondents, and, therefore, we cannot accord great weight to the deficit incurred by Associated during the first 3 months of combined operation in determining the issues in this proceeding." [Italics supplied.]

that "the consolidation would result in improved transportation service" (R. 18) is not the equivalent of a finding that existing transportation service is inadequate.

B. THE COMMISSION MADE NO FINDING AS TO THE EFFECT OF THE MERGER UPON ADEQUATE TRANSPORTATION SERVICE TO THE PUBLIC, AS REQUIRED BY SECTION 5 (2) (C) (1) OF THE ACT

Section 5 (2) (c) (1) requires that in passing upon any proposed merger, the Commission shall give weight to "The effect of the proposed transaction upon adequate transportation service to the public." Except for the findings referred to above with respect to improvement of service, the Commission made no findings as to the service that would be available to the public following the consummation of the merger.

The Commission's decision deals at length with motor-truck operations in the territory of the individual carriers participating in the merger *as related to the existing operations of such individual carriers*, but it makes no finding of motor-carrier competition to those lines *merged into one gigantic carrier*. The record shows that there would exist no motor carrier competitive with the carrier which would be created as a result of the merger. Whether or not competition exists is a factual matter to be proved in a given case. It is not a matter of general impression, as to which a finding can be made on the basis of certain statistical figures relied on by the Commission.

Facts conceivably known to the Commission but not put in evidence will not support an order. *Interstate Commerce Commission* v. *Louisville and Nashville Railroad Company*, 227 U. S. 88, 93 (1913); *The Chicago Junction Case*, 264 U. S. 258, 265 (1924). Clearly the burden is on the applicant to show the existence and nature of the motor-carrier competition which is alleged to exist. This would require evidence as to the rates, the operating rights, the route miles, the volume of business, and number of vehicles operated by the carriers claimed to be competitive. Likewise, the comparative cost to the shipping public, the comparative service in point of time of delivery, the methods of handling, and the existing minimum load requirements of the carriers claimed to be competitive should be put in evidence. Without these and other relevant facts no intelligent opinion, and certainly no finding, can be made with respect to whether or not these carriers are in fact competitive or with respect to the effect of the merger upon adequate transportation service to the public.

The independent motor carriers who intervened in the proceeding before the Commission sought to voice their concern over the adverse effect of the merger on their business, particularly with regard to interchange traffic. Their testimony graphically demonstrated that full and complete information on such traffic at the principal points

of interchange, showing volume and carriers involved, is essential to a determination of the effect of the merger on the ability of such independent carriers to continue to serve the public. The Antitrust Division sought the cooperation of the Commission in obtaining this vital information. While recognizing that the applicant, Associated Transports, Inc., would have power to control interchange traffic, the Commission denied the Division's motion to produce vital information thereon. That it is within the Commission's power to require such information cannot be doubted.

The facts developed by such an inquiry would, together with the evidence in this record, conclusively establish that the proposed merger will result in the diversion to Associated Transport of a large part of the interchange traffic which now moves from carriers concerned in the merger to motor carriers outside the merger, since the merged lines will, whenever possible, carry the traffic all the way to destination. Such diversion will adversely affect the independent lines. On the other hand, there cannot be a corresponding reduction in interchange traffic delivered to the merger since through its extensive route coverage the new company will in many areas furnish the only service available. This evidence is essential to a determination and finding by the Commission under the criterion set forth in Sec-

tion 5 (2) (c) of the Interstate Commerce Act, for the guidance of the Commission, which relates to "the effect of the proposed transaction upon adequate transportation service to the public".

C. THE COMMISSION MADE NO FINDING THAT THE EFFECT OF THE MERGER WOULD BE CONSISTENT WITH THE NATIONAL TRANSPORTATION POLICY TO PRESERVE THE INHERENT ADVANTAGES OF MOTOR TRANSPORTATION

The National Transportation Policy declared by the Congress when the Transportation Act of 1940 was passed provided that all of the provisions of the act should be administered and enforced with a view to carrying out the policy so declared, which included a requirement that regulation of all modes of transportation subject to provisions of the act be "so administered as to recognize and preserve the inherent advantages of each." The legislative history of the act shows that opponents of the legislation feared that motor and water transportation might suffer from the Commission's tendency to be "railroad-minded." Proponents of the legislation insisted that such a contingency was not to be anticipated, in view of the specific provision requiring the Commission to regulate each mode of transportation in such manner as to preserve its inherent advantages.[44] The importance of the declaration

[44] Congressional Record, vol. 84, pp. 5879–83. See also *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 63 S. Ct. 1296, 1310–11 (June 14, 1943).

of the National Transportation Policy cannot be denied. It is an integral part of the statute administered by the Commission. Nevertheless, the Commission has made no finding that the proposed merger would be consistent with the national policy so declared in the Act.

III

FINDINGS MADE BY THE COMMISSION LACK SUPPORT IN THE EVIDENCE

Under well-settled principles of judicial review, an order of the Commission may be set aside if not supported by substantial evidence. *The Chicago Junction Case*, 264 U. S. 258, 263 (1924); *I. C. C. v. L. & N. R. Co.*, 227 U. S. 88, 91–2 (1913).

A. THE COMMISSION'S FINDING THAT THE PROPOSED UNIFICATION IS PREDOMINANTLY AN END-TO-END CONSOLIDATION OF COMPLEMENTARY OPERATIONS IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

The Commission found that the proposed merger is predominantly an end-to-end consolidation of complementary operations (R. 44). As Commissioner Splawn observed in his dissenting opinion, this finding "is not supported by any facts showing the actual operations of the particular companies and seems contrary to the finding of duplication of mileage to the extent of 13,546 miles. One of the companies conducts a special contract-carrier service with armored vehicles. It could hardly be contended that such

a service is complementary to the services rendered by the other parties to the consolidation" (R. 48).

The record shows that what is here involved is not an end-to-end unification of complementary operations, but the component parts of two competing motor-carrier systems, insofar as the major portion of the territory is concerned. The merger will unite these competing carriers into one huge carrier which will then be the largest carrier of its kind in the United States. Substantially all of the operations of Consolidated are paralleled by one or more carriers involved in the merger. Seventy-five percent of the operations of Consolidated are in New England territory, and those operations are paralleled 90 percent by those of McCarthy. The other 25 percent of Consolidated's operations are paralleled 100 percent by those of Moran. Consolidated also parallels Horton and Barnwell between New York and Philadelphia.

Horton is in competition with Barnwell between New York and Philadelphia as well as between those points and Baltimore and Washington. Horton's competition with Barnwell extends further into Virginia, the Carolinas and Georgia, paralleling Barnwell's operations 95 percent. The record shows that the two largest carriers between New York and the South, Horton and Barnwell, form the backbone of the merger. If either of

these two competitors had been left out of the merger, as well as either Consolidated or McCarthy in the North, there would have been a nucleus about which to form a strong competing carrier operating from Boston to the South. To insure that no such competitor could be formed, it was agreed by the promoters that the consummation of the merger be conditioned upon the inclusion therein of Barnwell, Consolidated, Horton, McCarthy and Moran (R. 36).

In the light of these facts it is clear that the Commission's finding that the proposed transaction is predominantly an end-to-end consolidation is not supported by substantial evidence.

B. THE COMMISSION'S FINDING THAT THE APPLICANT IS NOT AND WOULD NOT BE AFFILIATED WITH ANY RAILROAD IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

In furtherance of its policy of competition in the transportation field, Congress has prohibited the control of one form of transportation by another except under the most limited of conditions. This is clearly shown in the history of the Motor Carrier Act of 1935 and the acts regulating other forms of surface transportation and air transportation. As early as 1912, Congress announced its policy of preserving the independence of water carriers by including in the Panama Canal Act [45] a provision which prohibited any common carrier subject to the Interstate Commerce Act from hav-

[45] 37 Stat. 560, 566.

ing any interest whatever in a water carrier or vessel operating through the Panama Canal or elsewhere with which such common carrier was in actual or potential competition."[46] The proper function of a railroad corporation," the House Committee in charge of that Act declared, "is to operate trains on its track, not to occupy the waters with ships in mock competiton with itself, which in reality operate to the extinction of all genuine competition."[47]

Congress wrote into the Motor Carrier Act of 1935 a proviso to Section 213 (a) (1) of that Act, which was designed to preserve the motor-carrier

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[46] In *Lake Line Applications under Panama Canal Act*, 33 I. C. C. 700, at page 716, the Commission found:

"These boat lines under the control of the petitioning railroads have been first a sword and then a shield. When these roads succeeded in gaining control of the boat lines which had been in competition with paralleling rails in which they were interested, and later effected their combination through the Lake Line Association, by which they were able to and did drive all independent boats from the through lake-and-rail transportation, they thereby destroyed the possibility of competition with their railroads other than such competition as they were of a mind to permit. Having disposed of real competition via the lakes, these boats are now held as a shield against possible competition of new independents. Since it appears from the records that the railroads are able to operate their boat lines at a loss where there is now no competition from independent lines, it is manifest that they could and would operate at a further loss in a rate war against independents. The large financial resources of the owning railroads make it impossible for an independent to engage in a rate war with a boat line so financed."

[47] H. Rep. No. 423, 62nd Cong., 2nd Sess., p. 12.

industry from domination or control by other forms of transportation which "might use the control as a means to strangle, curtail, or hinder progress in highway transportation for the benefit of the other competing transportation." [48] In 1938 a similar proviso was inserted in Section 408 (b) of the Civil Aeronautics Act [49] and for a similar purpose.[50] In the Transportation Act of 1940, Congress again affirmed its policy with respect to the independence of competing forms of transportation by reenacting therein the provisions of the Panama Canal Act [51] and of Section 213 of the Motor Carrier Act.[52]

This legislative policy was evolved out of years of experience. Seldom have new forms of transportation been developed by those engaged in operating the older means of transportation. Further, the older transportation agencies have generally resisted the new, and have entered the

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[48] 79 Cong. Rec. 5655, 12205–6.

[49] 52 Stat. 973, 1001; 54 Stat. 735; 49 U. S. C. 401, 488.

[50] *Pan American Airways Co.* v. *Civil Aeronautics Board*, 121 Fed. 2d 810 (C. C. A. 2d).

[51] 49 U. S. C. 5 (14–16) (Supp. 1941).

[52] 49 U. S. C. 5 (2) (Supp. 1941); Section 5 (2) (b), Interstate Commerce Act. Although fear was expressed that the slightly altered language of the two sections represented a relaxation of the traditional policy of Congress (86 Cong. Rec. 10175–76, 10180–88, 11270–74, 11537–47, 11610–22, 11634–39, 11760–66), the conferees in charge of the bill stated that the changes were intended merely to clarify the earlier provisions and to leave the substance unchanged (86 Cong. Rec. 10175, 10188, 11270–74, 11543, 11546), and the conference bill was passed without amendment (86 Cong. Rec. 10194, 11766).

new field only after its commercial possibilities have been demonstrated and the new transportation has come to be regarded as a competitive threat to the old. Then the purpose was generally to suppress. Congress in adopting the restrictive provisions of Section 5 (2) (b) intended that motor carriers should be free to act independently of conflicting interests and feared that in the absence of strict public control, motor carriers might become economic captives of financial interests whose primary concern would be the protection of their investments in other forms of transportation.[53] Therefore, the proviso in the above section of the Act requires a showing not merely that the proposed control or domination is consistent with the public interest, but that it will actively promote the public interest in a particular way, that is, by enabling the acquiring carrier "to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."[54]

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[53] See *American Export Airlines, Inc., etc.*, Docket No. 319, decided July 30, 1942, 3 C. A. B. 631.

[54] The proviso of section 5 (2) (b) reads as follows:

"*Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

It is this proviso of the Act, considered against the above background of its legislative history, that must be applied to the interest of Kuhn, Loeb & Company in this case. The record regarding that interest discloses the following:

First, under the order of March 16, 1942, Kuhn, Loeb & Company, through its wholly owned subsidiary, Transport Company, was authorized to become a substantial minority stockholder of Associated Transport, Inc., owning 6,877 shares, or 18.13 percent, of Associated's preferred stock, and 67,167 shares, or 9.53 percent, of its common stock. The preferred stock has equal voting rights with the common. No single person or corporation owns a majority of the voting stock of Associated Transport, Inc. (R. 36, 41)

Secondly, Kuhn, Loeb & Company had one of its office managers as director of Associated Transport. (R. 11, 750)

Thirdly, Kuhn, Loeb & Company has representatives on the Board of Directors of various railroads throughout the United States. It has for many years been the banker for the Pennsylvania Railroad and Baltimore and Ohio Railroad, both of which serve the territory involved in the proposed merger and, according to the record, are competitive with the motor carriers involved in the merger. (R. 36, 754)

Fourthly, it is denied that any arrangements have been made with Kuhn, Loeb & Company or

with any other banking house to handle the public sale of the securities to be issued. However, it is stated that the securities will not be sold at public sale but pursuant to private arrangement. (R. 39, 751)

The proviso in Section 5 (2) (b) relates not only to the acquisition of motor carriers by a railroad but also by persons or corporations affiliated with a railroad. The term "affiliation" is not left in doubt. It is defined in the statute.[55] Paraphrasing this paragraph, the issue of fact in this case is whether, by reason of the relationship (and the act does not state "stock ownership"; it states "relationship") of Kulm, Loeb & Company to the Pennsylvania Railroad Company and the Baltimore and Ohio Railroad Company, it is reasonable to believe that the affairs of Associated Transport, Inc., will be managed in the interest of those railroads. This would involve among others a consideration whether, if a conflict of interest should arise between these railroads and

[55] Section 5 (6) of the Interstate Commerce Act reads as follows:

"For the purposes of this section a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier."

this motor carrier, Kuhn, Loeb & Company would or could use the weight of its influence against the motor carrier in such manner as to unduly restrain competition.

As the Commission in its report stated that "Protestant's allegation does not specify the particular railroad or railroads with which it is believed applicant would be affiliated as the result of the participation of Kuhn, Loeb & Company," the Antitrust Division included in its Petition for Reopening and Rehearing, which was denied by the Commission, an offer to prove by documentary evidence and by a series of concrete cases drawn from the files of The Pennsylvania Railroad Company, The Baltimore and Ohio Railroad Company, the records of the Interstate Commerce Committee, and the Banking and Currency Committee of the United States Senate, the records of the Interstate Commerce Commission, and from other similar sources, the following facts:

(a) That Kuhn, Loeb & Company have been the principal bankers for the Pennsylvania Railroad System for over a half century and still act in that capacity.

(b) That the major financial transactions between Kuhn, Loeb & Company and the Pennsylvania Railroad System total in excess of $1,300,000,000.

(c) That Kuhn, Loeb & Company participated in conferences and planning out of which was organized the Penroad Corporation designed to avoid

the jurisdiction of the Interstate Commerce Commission and the provisions of the Clayton Anti-trust Act; that the entire voting power of the stockholders of that corporation was vested in an officer and two directors of the Pennsylvania Railroad Company; and that the stated purpose of that corporation was "to invest its funds in securities of any corporation or other agency, including those engaged in transportation of any description on land or water or by air, but without power to operate railroads."

(d) That Kuhn, Loeb & Company participated in and negotiated purchases of stock in carriers for the Pennsylvania Railroad System.

(e) That the Pennsylvania Railroad Company through its wholly owned subsidiary, American Contract and Trust Company, owns and operates common carriers of property by motor vehicle and is today the largest railroad owner and operator of such motor truck lines in the Nation.

(f) That the common-carrier motor-truck operations of the Pennsylvania Railroad Company through the American Contract and Trust Company parallel in part those of motor carriers, which are parties to the proposed merger in these proceedings.

(g) That Kuhn, Loeb & Company have been the principal bankers for The Baltimore and Ohio Railroad Company for over a half century.

(h) That Kuhn, Loeb & Company, with Speyer & Co., reorganized The Baltimore and Ohio Rail-

road Company and acted as reorganization managers.

(i) That Kuhn, Loeb & Company has underwritten and sold to the public large amounts of securities for The Baltimore and Ohio Railroad Company and has participated in and negotiated the purchase of stock in carriers for that railroad.

(j) That The Baltimore and Ohio Railroad Company owns a substantial stock interest in a large common carrier of property by motor vehicle which is competitive in part with motor carriers, which are parties to this merger.

(k) That even though Kuhn, Loeb & Company did not have as much as one (1) percent stock interest in The Pennsylvania Railroad Company and The Baltimore and Ohio Railroad Company, they have exercised a powerful influence over those railroads, which has often been a determining factor in their affairs (R. 475).

On the record in this case, and particularly in the light of the offer of proof hereinabove set forth, it is submitted that the substantial financial interest which Kuhn, Loeb & Company would obtain in Associated Transport, Inc., would be contrary to the public interest and the National Transportation Policy,[56] and, further, that the

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[56] Commissioner Patterson, in a dissenting opinion, stated:

"The main purpose of Arrow inclusion appears to be the opportunity afforded a great banking institution to enter the vast motor-carrier business which serves the nation. I cannot approve indirect participation by Kuhn, Loeb & Com-

instant transaction falls within the proviso of Section 5 (2) (b), in that the circumstances here present are such as to make it reasonable to believe that by reason of the relationship of Kuhn, Loeb & Company to The Pennsylvania Railroad Company and The Baltimore and Ohio Railroad Company, the affairs of Associated Transport, Inc., will be managed in the interest of such railroads. The finding of the Commission that the "applicant is not, and upon consummation of the transactions as proposed would not be, affiliated with any railroad" is, therefore, not supported by substantial evidence.

IV

THE COMMISSION'S SUPPLEMENTAL ORDER, VACATING IN PART ITS ORDER OF MARCH 16, 1942, DID NOT RENDER MOOT THE IMPORTANT PUBLIC QUESTIONS ARISING UNDER THE PROVISO OF SECTION 5 (2) (B)

Protestants opposed the application to the Interstate Commerce Commission for authority to merge the carriers here involved on the specific

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pany as part owner of Associated Transport. The influence of such a financial power over the affairs of corporations of which they own a part is far beyond the proportion of stock held. Evils which have attended such participation in railroad transportation are well known. Section 5 of the act was designed largely to avoid recurrence of such evils. The national transportation policy makes it a Commission responsibility to avoid dangers that may injure the transportation system which serves national commerce and defense. I regard part ownership of Associated Transport by Kuhn, Loeb & Company as inimical to public interest and national welfare" (R. 49).

ground, among others, that Arrow Carrier Corporation, one of the parties to the merger, was dominated by Kuhn, Loeb & Company, bankers for the Pennsylvania Railroad Company and The Baltimore and Ohio Railroad Company. The Commission, however, by its order of March 16, 1942, approved the transaction and permitted the inclusion of Arrow Carrier Corporation. Important issues were thereby presented as to the validity of the order of the Commission in view of the terms of the proviso of Section 5 (2) (b).

The court below declined to pass on these issues and disposed of the case as though Arrow had never been a party (R. 85).

Following the institution of suit in the District Court, the sponsors of this merger reduced Kuhn, Loeb & Company's stock participation in Associated Transport, Inc. This they did through a petition to the Commission by Associated Transport, Inc., wherein a supplemental order was sought vacating the order of March 16, 1942, to the extent that it authorized the inclusion of Arrow in the merger. An order granting the petition was entered June 8, 1942. Under the decision of the Commission, no such supplemental order was required for the withdrawal of Arrow. The statement in the Commission's decision thereon is as follows:

> In the event that the parties are unable to include Arrow in the consolidation as

herein authorized, the transaction may nevertheless be consummated in other respects pursuant to our order herein *and without necessity for further or modified authority.* [Italics supplied.] (R. 12.)

The courts have consistently held that where questions of public interest are concerned, and where the interpretation of a statute by a commission or similar body under conditions which may be repeated is challenged, the court's jurisdiction continues for the purpose of considering these questions for the guidance of the Commission in the same or similar proceedings.[57]

The Court will note that, under the provisions of Section 5 of the Interstate Commerce Act, Kuhn, Loeb & Company cannot acquire control of more than one motor carrier without Commission approval. If the motor carriers here involved are merged into one company, as proposed, Kuhn, Loeb & Company can proceed, under the Commission's ruling that it is not affiliated with any railroad, to increase its stock holdings in Associated Transport, Inc., to full control without Commission interference.

For the above reasons, it is submitted that the supplemental order of the Commission did not

[57] *Federal Trade Com.* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257, 260 (1938); *So. Pac. Terminal Co.* v. *Int. Comm. Comm.*, 219 U. S. 498; *So. Pac. Co.* v. *Interstate Comm. Comm.*, 219 U. S. 433; *United States* v. *Freight Association*, 166 U. S. 290.

render moot the important public questions arising under Section 5 (2) (b) and considered in Section III–B of this Brief.

CONCLUSION

Since the Interstate Commerce Commission misconstrued the applicable provisions of law and did not apply the proper statutory standards and criteria, its order should be set aside for mistake of law. The order should be set aside also because the Commission did not make the necessary findings and because findings made by it lack support in the evidence.

Respectfully submitted.

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OCTOBER 1943.

APPENDIX

SHERMAN ANTITRUST ACT, JULY 2, 1890 (26 STAT. 209)

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

NATIONAL TRANSPORTATION POLICY (54 STAT. 899)

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust dis-

criminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

AN ACT TO REGULATE COMMERCE, FEBRUARY 4, 1887 (24 STAT. 379, 380)

SEC. 5. That it shall be unlawful for any common carrier subject to the provisions of this Act to enter into any contract, agreement or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense.

PANAMA CANAL ACT OF 1912 (37 STAT. 560, 566)

SEC. 11. That section five of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, is hereby amended by adding thereto a new paragraph at the end thereof as follows:

"From and after the first day of July, nineteen hundred and fourteen, it shall be unlawful for any railroad company or other common carrier subject to the Act to regulate commerce to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense."

Jurisdiction is hereby conferred on the Interstate Commerce Commission to determine questions of fact as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. Such application may be filed for the purpose of determining whether any existing service is in violation of this section and pray for an order permitting the continuance of any vessel or vessels already in operation, or for the purpose of asking an order to install new service not in conflict with the provisions of this paragraph. The commission may on its own motion or the application of any shipper institute proceedings to inquire into the operation of any vessel in use by any railroad or other carrier which has not applied to the

commission and had the question of competition or the possibility of competition determined as herein provided. In all such cases the order of said commission shall be final.

If the Interstate Commerce Commission shall be of the opinion that any such existing specified service by water other than through the Panama Canal is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent, nor reduce competition on the route by water under consideration, the Interstate Commerce Commission may, by order, extend the time during which such service by water may continue to be operated beyond July first, nineteen hundred and fourteen. In every case of such extension the rates, schedules, and practices of such water carrier shall be filed with the Interstate Commerce Commission and shall be subject to the act to regulate commerce and all amendments thereto in the same manner and to the same extent as is the railroad or other common carrier controlling such water carrier or interested in any manner in its operation: *Provided,* Any application for extension under the terms of this provision filed with the Interstate Commerce Commission prior to July first, nineteen hundred and fourteen, but for any reason not heard and disposed of before said date, may be considered and granted thereafter.

No vessel permitted to engage in the coastwise or foreign trade of the United States shall be permitted to enter or pass through said canal if such ship is owned, chartered, operated, or controlled by any person or company which is doing

business in violation of the provisions of the Act of Congress approved July second, eighteen hundred and ninety, entitled, "An Act to protect trade and commerce against unlawful restraints and monopolies," or the provisions of sections seventy-three to seventy-seven, both inclusive, of an Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," or the provisions of any other Act of Congress amending or supplementing the said Act of July second, eighteen hundred and ninety, commonly known as the Sherman Antitrust Act, and amendments thereto, or said sections of the Act of August twenty-seventh, eighteen hundred and ninety-four. The question of fact may be determined by the judgment of any court of the United States of competent jurisdiction in any cause pending before it to which the owners or operators of such ship are parties. Suit may be brought by any shipper or by the Attorney General of the United States.

TRANSPORTATION ACT OF 1920 (41 STAT. 456, 480)

SEC. 407. The first paragraph of section 5 of the Interstate Commerce Act is hereby amended to read as follows:

"SEC. 5. (1) That, except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this Act, it shall be unlawful for any common carrier subject to this Act to enter into any contract agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing

railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid each day of its continuance shall be deemed a separate offense: *Provided,* That whenever the Commission is of opinion, after hearing upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, or upon its own initiative, that the division of their traffic or earnings, to the extent indicated by the Commission, will be in the interest of better service to the public, or economy in operation, and will not unduly restrain competition, the Commission shall have authority by order to approve and authorize, if assented to by all the carriers involved, such division of traffic or earnings, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises.

"(2) Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition under such rules

and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises.

"(3) The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1) or (2), as it may deem necessary or appropriate.

"(4) The Commission shall as soon as practicable prepare and adopt a plan for the consolidation of the railway properties of the continental United States into a limited number of systems. In the division of such railways into such systems under such plan, competition shall be preserved as fully as possible and wherever practicable the existing routes and channels of trade and commerce shall be maintained. Subject to the foregoing requirements, the several systems shall be so arranged that the cost of transportation as between competitive systems and as related to the values of the properties through which the service is rendered shall be the same, so far as practicable, so that these systems can employ uniform rates in the movement of competitive traffic and under efficient management earn substantially the same rate of return upon the value of their respective railway properties.

"(5) When the Commission has agreed upon a tentative plan, it shall give the same due publicity and upon reasonable notice, including notice to the Governor of each State, shall hear all persons who may file or present objections thereto. The Commission is authorized to prescribe a procedure for such hearings and to fix a time for bringing them to a close. After the hearings

are at an end, the Commission shall adopt a plan for such consolidation and publish the same; but it may at any time thereafter, upon its own motion or upon application, reopen the subject for such changes or modifications as in its judgment will promote the public interest. The consolidations herein provided for shall he in harmony with such plan.

"(6) It shall be lawful for two or more carriers by railroad, subject to this Act, to consolidate their properties or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership, management, and operation, under the following conditions:

"(a) The proposed consolidation must be in harmony with and in furtherance of the complete plan of consolidation mentioned in paragraph (5) and must be approved by the Commission;

"(b) The bonds at par of the corporation which is to become the owner of the consolidated properties, together with the outstanding capital stock at par of such corporation, shall not exceed the value of the consolidated properties as determined by the Commission. The value of the properties sought to be consolidated shall be ascertained by the Commission under section 19a of this Act, and it shall be the duty of the Commission to proceed immediately to the ascertainment of such value for the properties involved in a proposed consolidation upon the filing of the application for such consolidation.

"(c) Whenever two or more carriers propose a consolidation under this section, they shall present their application therefor to the Commission,

and thereupon the Commission shall notify the Governor of each State in which any part of the properties sought to be consolidated is situated and the carriers involved in the proposed consolidation, of the time and place for a public hearing. If after such hearing the Commission finds that the public interest will be promoted by the consolidation and that the conditions of this section have been or will be fulfilled, it may enter an order approving and authorizing such consolidation, with such modifications and upon such terms and conditions as it may prescribe, and thereupon such consolidation may be effected, in accordance with such order, if all the carriers involved assent thereto, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

"(7) The power and authority of the Commission to approve and authorize the consolidation of two or more carriers shall extend and apply to the consolidation of four express companies into the American Railway Express Company, a Delaware corporation, if application for such approval and authority is made to the Commission within thirty days after the passage of this amendatory Act; and pending the decision of the Commission such consolidation shall not be dissolved.

"(8) The carriers affected by any order made under the foregoing provisions of this section and any corporation organized to effect a consolidation approved and authorized in such order shall be, and they are hereby, relieved from the operation of the 'antitrust laws,' as designated in section 1 of the Act entitled 'An Act to supplement exist-

ing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, and of all other restraints or prohibitions by law, State or Federal, insofar as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section."

SEC. 408. The paragraph of section 5 of the Interstate Commerce Act, added to such section by section 11 of the Act entitled "An Act to provide for the opening, maintenance, protection, and operation of the Panama Canal and the sanitation and government of the Canal Zone," approved August 24, 1912, is hereby amended by inserting "(9)" at the beginning thereof.

The two paragraphs of section 11 of such Act of August 24, 1912, which followed the paragraph added by such section to section 5 of the Interstate Commerce Act, are hereby made a part of section 5 of the Interstate Commerce Act. The first paragraph so made a part of section 5 of the Interstate Commerce Act is hereby amended by inserting "(10)" at the beginning thereof, and the second such paragraph is hereby amended by inserting "(11)" at the beginning thereof.

AN ACT TO AMEND SECTION 407 OF THE TRANSPORTATION ACT OF 1920, ENACTED JUNE 10, 1921 (42 STAT. 27)

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That Section 407 of the Transportation Act of 1920 be, and it is hereby amended by adding thereto a new paragraph designated as paragraph 9 as follows:

"(9) Upon the application of one or more telephone companies for authority to consolidate their properties or a part thereof into a single company, or for authority for one or more such companies to acquire the whole or any part of the property of another telephone company or other telephone companies or the control thereof by the purchase of securities or by lease or in any other like manner, when such consolidated company would be subject to this Act, the Commission shall fix a time and place for a public hearing upon such application and shall thereupon give reasonable notice in writing to the Governor of each of the States in which the physical property affected, or any part thereof, is situated, and to the State Public Service Commission or other regulatory body, if any, having jurisdiction over telephone companies, and to such other persons as it may deem advisable. After such public hearing, if the Commission finds that the proposed consolidation, acquisition, or control will be of advantage to the persons to whom service is to be rendered and in the public interest, it shall certify to that effect; and thereupon any act or acts of Congress making the proposed transaction unlawful shall not apply. Nothing in this paragraph contained shall be construed as in any wise limiting or restricting the powers of the several States as now existing to control and regulate telephone companies."

EMERGENCY RAILROAD TRANSPORTATION ACT OF 1933 (48 STAT. 211, 217)

SECTION 201. Section 5 of the Interstate Commerce Act, as amended (U. S. C., title 49, sec. 5), is amended by striking out paragraphs (2) and

(3) and by renumbering paragraphs (4) and (5) as paragraphs (2) and (3), respectively, and by striking out the last sentence of the paragraph so renumbered as paragraph (3).

SEC. 202. Such section 5 is further amended by striking out paragraphs (6), (7), and (8), and by inserting in lieu thereof the following paragraphs:

"(4) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b), for two or more carriers to consolidate or merge their properties, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through purchase of its stock; or for a corporation which is not a carrier to acquire control of two or more carriers through ownership of their stock; or for a corporation which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock.

"(b) Whenever a consolidation, merger, purchase, lease, operating contract, or acquisition of control is proposed under subdivision (a), the carrier or carriers or corporation seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such

carriers and the applicant or applicants, of the time and place for a public hearing. If after such hearing the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed consolidation, merger, purchase, lease, operating contract, or acquisition of control will be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3), and will promote the public interest, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon the terms and conditions and with the modifications so found to be just and reasonable.

"(5) Whenever a corporation which is not a carrier is authorized, by an order entered under paragraph (4), to acquire control of any carrier or of two or more carriers, such corporation thereafter shall, to the extent provided by the Commission, for the purposes of paragraphs (1) to (10), inclusive, of section 20 (relating to reports, accounts, and so forth, of carriers), including the penalties applicable in the case of violations of such paragraphs, be considered as a common carrier subject to the provisions of this Act, and for the purposes of paragraphs (2) to (11), inclusive, of section 20a (relating to issues of securities and assumptions of liability of carriers), including the penalties applicable in the case of violations of such paragraphs, be considered as a "carrier" as such term is defined in paragraph (1) of such section, and be treated as such by the Commission in the administration of the para-

graphs specified. In the application of such provisions of section 20a in the case of any such corporation the Commission shall authorize the issue or assumption applied for only if it finds that such issue or assumption is consistent with the proper performance by each carrier which is under the control of such corporation of its service to the public as a common carrier, will not impair the ability of any such carrier to perform such service, and is otherwise compatible with the public interest.

"(6) It shall be unlawful for any person, except as provided in paragraph (4), to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (7), the words 'control or management' shall be construed to include the power to exercise control or management.

"(7) For the purposes of paragraphs (6) and (11), but not in anywise limiting the application thereof, any transaction shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers—

"(a) If such transaction is by a carrier, and if the effect of such transaction is to place such

carrier and persons affiliated with it, taken together, in control of another carrier.

"(b) If such transaction is by a person affiliated with a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier.

"(c) If such transaction is by two or more persons acting together, one of whom is a carrier or is affiliated with a carrier, and if the effect of such transaction is to place such persons and carriers and persons affiliated with any one of them and persons affiliated with any such affiliated carrier, taken together, in control of another carrier.

"(8) For the purposes of paragraph (7) a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier.

"(9) For the purposes of paragraphs (6), (7), (8), and (11), wherever reference is made to control it is immaterial whether such control is direct or indirect. As used in this paragraph and paragraphs (7), (8), and (11) the term "control" shall be construed to include the power to exercise control.

"(10) The Commission is hereby authorized, upon complaint or upon its own initiative without

complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (6). If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation.

"(11) For the proper protection and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3) and the regulation of interstate commerce in accordance therewith, the Commission is hereby authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether the holding by any person of stock or other share capital of any carrier (unless acquired with the approval of the Commission) has the effect (a) of subjecting such carrier to the control of another carrier or to common control with another carrier, and (b) of preventing or hindering the carrying out of any part of such plan or of impairing the independence, one of another, of the systems provided for in such plan. If the Commission finds after such investigation that such holding has the effects described, it shall by order provide for restricting the exercise of the voting power of such person with respect to such stock or other share capital (by requiring the deposit thereof with a trustee, or by other appropriate means) to the extent necessary to prevent such holding from continuing to have such effects.

"(12) If in the course of any proceeding under this section before the Commission, or of any proceeding before a court in enforcement of an order entered by the Commission under this section, it appears that since the beginning of such proceeding the plan for consolidation has been reopened under paragraph (3) for changes or modifications with respect to the allocation of the properties of any carrier involved in such proceeding, then such proceeding may be suspended.

"(13) The district courts of the United States shall have jurisdiction upon the application of the Commission, alleging a violation of any of the provisions of this section or disobedience of any order issued by the Commission thereunder by any person, to issue such writs of injunction or other proper process, mandatory or otherwise, as may be necessary to restrain such person from violation of such provision or to compel obedience to such order.

"(14) The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (4), (10), or (11), as it may deem necessary or appropriate.

"(15) The carriers and any corporation affected by any order made under the foregoing provisions of this section shall be, and they are hereby, relieved from the operation of the antitrust laws as designated in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, and of all other restraints or prohibitions by or imposed un-

der authority of law, State or Federal, insofar as may be necessary to enable them to do anything authorized or required by such order.

"(16) If any provision of the foregoing paragraphs of this section, or the application thereof to any person or circumstances, is held invalid, the other provisions of such paragraphs, and the application of such provision to any other person or circumstances, shall not be affected thereby.

"(17) As used in paragraphs (4) to (16), inclusive, the term 'person' includes an individual, partnership, association, joint-stock company, or corporation, and the term 'carrier' means a carrier by railroad subject to this Act."

SEC. 203. Such section 5 is further amended by renumbering as paragraph (18) the paragraph added by the Act entitled "An Act to amend section 407 of the Transportation Act of 1920," approved June 10, 1921, and by renumbering the remaining three paragraphs as paragraphs (19), (20), and (21), respectively.

SEC. 204. The provisions of the Interstate Commerce Act, as amended, and of all other applicable Federal statutes, as in force prior to the enactment of this title, shall remain in force, as though this title had not been enacted, with respect to the acquisition by any carrier, prior to the enactment of this title, of the control of any other carrier or carriers.

MOTOR CARRIER ACT OF 1935 (49 STAT. 543, 555)

CONSOLIDATION, MERGER, AND ACQUISITION OF CONTROL

SEC. 213. (a) It shall be lawful, under the conditions specified below, but under no other con-

ditions, for two or more motor carriers which are not also carriers by railroad to consolidate or merge their properties, or any part thereof, into one corporation for the ownership, management, and or operation of the properties theretofore in separate ownership; or for any such motor carrier or two or more such carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another such carrier; or for any such motor carrier or two or more such carriers jointly, to acquire control of another such carrier through purchase of its stock; or for a person which is not a motor carrier or a carrier by railroad, or express, or water to acquire control of two or more motor carriers through ownership of their stock; or for any such person which has control of one or more motor carriers to acquire control of another such carrier through ownership of its stock; or for a carrier by railroad, express, or water to consolidate, or merge with, or acquire control of, any motor carrier or to purchase, lease, or contract to operate its properties, or any part thereof.

(1) Whenever a consolidation, merger, purchase, lease, operating contract, or acquisition of control is proposed under this section, the carrier or carriers or the person seeking authority therefore shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties or operations of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants, and other parties known to have a substantial interest in the proceed-

ing of the time and place for a public hearing. If after such hearing the Commission finds that the transaction proposed will be consistent with the public interest and that the conditions of this section have been or will be fulfilled, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided, however,* That if a carrier other than a motor carrier is an applicant, or any person which is controlled by such a carrier other than a motor carrier or affiliated therewith within the meaning of section 5 (8) of part I, the Commission shall not enter such an order unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than a motor carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(2) Whenever a person which is not a motor carrier is authorized, by an order entered under subparagraph (1) of this section, to acquire control of any such carrier or of two or more such carriers, such person thereafter shall, to the extent provided by the Commission, for the purposes of section 204 (a) (1), and section 220 (a) and (b), relating to accounts, records, and reports, and to the inspection of facilities and records, including the penalties applicable in the case of violations thereof, be subject to the provisions of this part.

(b) (1) It shall be unlawful for any person, except as provided in paragraph (a), to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a com-

mon interest of any two or more motor carriers which are not also carriers by railroad, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this part and in violation of this paragraph. As used in this paragraph, the words "control or management" shall be construed to include the power to exercise control or management.

(2) The Commission is hereby authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (b) (1) of this section. If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action consistent with the provisions of this part as may be necessary, in the opinion of the Commission, to prevent further violation of such provisions.

(3) For the purposes of this section, wherever reference is made to control, it is immaterial whether such control is direct or indirect.

(c) The district courts of the United States shall have jurisdiction upon the application of the Commission, alleging a violation of any of the provisions of this section or disobedience of any order issued by the Commission thereunder by any person, to issue such writs of injunction or other proper process, mandatory or otherwise, as may be

necessary to restrain such person from violation of such provision or to compel obedience to such order.

(d) The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraphs (a) or (b), as it may deem necessary or appropriate.

(e) Except where a carrier other than a motor carrier is an applicant or any person which is controlled by such a carrier or carriers by railroad or affiliated therewith within the meaning of section 5 (8) of part I, the provisions of this section requiring authority from the Commission for consolidation, merger, purchase, lease, operating contract, or acquisition of control shall not apply where the total number of motor vehicles involved is not more than twenty.

(f) The carriers and any person affected by any order made under the foregoing provisions of this section shall be, and they are hereby, relieved from the operation of the "antitrust laws," as designated in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, and of all other restraints or prohibitions by or imposed under authority of law, State or Federal, insofar as may be necessary to enable them to do anything authorized or required by such order.

TRANSPORTATION ACT OF 1940 (54 STAT. 898, 905)

POOLING; UNIFICATIONS, MERGERS, AND ACQUISITIONS OF CONTROL

SEC. 7. Section 5 of the Interstate Commerce Act, as amended, is amended to read as follows:

"SEC. 5. (1) Except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this part, it shall be unlawful for any common carrier subject to this part, part II, or part III to enter into any contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof; and in any case of an unlawful agreement for the pooling or division of traffic, service, or earnings as aforesaid each day of its continuance shall be a separate offense: *Provided,* That whenever the Commission is of opinion, after hearing upon application of any such carrier or carriers or upon its own initiative, that the pooling or division, to the extent indicated by the Commission, of their traffic, service, or gross or net earnings, or of any portion thereof, will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition, the Commission shall by order approve and authorize, if assented to by all the carriers involved, such pooling or division, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises: *Provided further,* That any contract, agreement, or combination to which any common carrier by water subject to part III is a party, relating to the pooling or division of traffic, service, or earnings, or any portion thereof, lawfully existing on the date this paragraph as amended

takes effect, if filed with the Commission within six months after such date, shall continue to be lawful except to the extent that the Commission, after hearing upon application or upon its own initiative, may find and by order declare that such contract, agreement, or combination is not in the interest of better service to the public or of economy in operation, or that it will unduly restrain competition.

"(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof in one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier and terminals incidental thereto.

"(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or

person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing, and a public hearing shall be held in all cases where carriers by railroad are involved. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

"(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

"(d) The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

"(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph (2) except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph (2) which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

"(f) As a condition of its approval, under this paragraph (2), of any transaction involving a car-

rier or carriers by railroad subject to the provision of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

"(3) Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2), to acquire control of any carrier or of two or more carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control: Section 20 (1) to (10), inclusive, of this part, sections 204 (a) (1) and (2) and 220 of part II, and section 313 of part III (which relate to reports, accounts, and so forth, of carriers),

and section 20a (2) to (11), inclusive, of this part, and section 214 of part II (which relate to issues of securities and assumptions of liability of carriers), including in each case the penalties applicable in the case of violations of such provisions. In the application of such provisions of section 20a of this part and of section 214 of part II, in the case of any such person, the Commission shall authorize the issue or assumption applied for only if it finds that such issue or assumption is consistent with the proper performance of its service to the public by each carrier which is under the control of such person, that it will not impair the ability of any such carrier to perform such service, and that it is otherwise consistent with the public interest.

"(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words "control or management" shall be construed to include the power to exercise control or management.

"(5) For the purposes of this section, but not in anywise limiting the application of the provisions thereof, any transaction shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers—

(a) if such transaction is by a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(b) if such transaction is by a person affiliated with a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(c) if such transaction is by two or more persons acting together, one of whom is a carrier or is affiliated with a carrier, and if the effect of such transaction is to place such persons and carriers and persons affiliated with any one of them and persons affiliated with any such affiliated carrier, taken together, in control of another carrier.

"(6) For the purposes of this section a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier.

"(7) The Commission is hereby authorized, *upon complaint or upon its own initiative without* complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4). If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation. The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this part; and with respect to any violation of paragraphs (2) to (12), inclusive, of this section, any penalty provision applying to such a violation by a common carrier subject to this part shall apply to such a violation by any other person.

"(8) The district courts of the United States shall have jurisdiction upon the complaint of the Commission, alleging a violation of any of the provisions of this section or disobedience of any order issued by the Commission thereunder by any person, to issue such writs of injunction or other proper process, mandatory or otherwise, as may be necessary to restrain such person from violation of such provision or to compel obedience to such order.

"(9) The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7), as it may deem necessary or appropriate.

"(10) Nothing in this section shall be construed to require the approval or authorization of the Commission in the case of a transaction within the scope of paragraph (2) where the only parties to the transaction are motor carriers subject to part II (but not including a motor carrier controlled by or affiliated with a carrier as defined in section 1 (3)), and where the aggregate number of motor vehicles owned, leased, controlled, or operated by such parties, for purposes of transportation subject to part II, does not exceed twenty.

"(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized

under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transactions so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its power under its corporate charter or under the laws of any State.

"(12) If any provision of the foregoing paragraphs of this section, or the application thereof to any person or circumstances, is held invalid, the other provisions of such paragraphs, and the application of such provision to any other person or circumstances, shall not be affected thereby.

"(13) As used in paragraphs (2) to (12), inclusive, the term 'carrier' means a carrier by railroad and an express company, subject to this part; a motor carrier subject to part II; and a water carrier subject to part III.

"(14) Notwithstanding the provisions of paragraph (2), from and after the 1st day of July 1914, it shall be unlawful for any carrier as defined in section 1 (3), or (after the date of the enactment of this amendatory section) any person

controlling, controlled by, or under common control with, such a carrier to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which such carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense.

"(15) Jurisdiction is hereby conferred on the Commission to determine questions of fact, arising under paragraph (14), as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. Such application may be filed for the purpose of determining whether any existing service is in violation of such paragraph and may pray for an order permitting the continuance of any vessel or vessels already in operation, or may pray for an order under the provisions of paragraph (16). The Commission may on its own motion or the application of any shipper institute proceedings to inquire into the operation of any vessel in use by any railroad or other carrier which has not applied to the Commission and had the question of competition or the possibility of competition determined as herein provided. In all such cases the order of said Commission shall be final.

"(16) Notwithstanding the provisions of paragraph (14), the Commission shall have authority, upon application of any carrier, as defined in section 1 (3), and after hearing, by order to authorize such carrier to own or acquire ownership of, to lease or operate, to have or acquire control of, or to have or acquire an interest in, a common carrier by water or vessel, not operated through the Panama Canal, with which the applicant does or may compete for traffic, if the Commission shall find that the continuance or acquisition of such ownership, lease, operation, control, or interest will not prevent such common carrier by water or vessel from being operated in the interest of the public and with advantage to the convenience and commerce of the people, and that it will not exclude, prevent, or reduce competition on the route by water under consideration: *Provided*, That if the transaction or interest sought to be entered into, continued, or acquired is within the scope of paragraph (2) (a), the provisions of paragraph (2) shall be applicable thereto in addition to the provisions of this paragraph: *And provided further*, That no such authorization shall be necessary if the carrier having the ownership, lease, operation, control, or interest has, prior to the date this section as amended becomes effective, obtained an order of extension under the provisions of paragraph (21) of this section, as in effect prior to such date, and such order is still in effect."

U. S. GOVERNMENT PRINTING OFFICE: 1943